October 2003

Update: Sexual Assault Benchbook

CHAPTER 7

General Evidence

7.2 Rape Shield Provisions

C. Notice Requirements

Insert the following text on page 324 at the end of the last paragraph in subsection C:

In *People v McLaughlin*, ___ Mich App ___ (2003), the victim testified that, prior to the sexual assault, she had suffered a severe spinal injury, and that she was in too much pain to have consensual sexual relations with anyone. The defendant sought to admit evidence of consensual sexual relations between him and the victim that occurred both before and after the victim's spinal injury. The defendant did not provide any notice prior to the trial, as required by MCL 750.520j. The trial court excluded the evidence. On appeal, the Court of Appeals reiterated its holdings in *People v Lucas (On Remand)*, 193 Mich App 298 (1992) and *People v Lucas (After Remand),* 201 Mich App 717 (1993), and found that it was error for a trial court to exclude evidence *solely* on the basis of defendant's failure to give notice.

The Court of Appeals concluded that the defendant's proposed evidence of consensual sexual relations prior to the victim's injury would not have served a legitimate purpose because the evidence had already established that the defendant and victim had such relations. Evidence that the defendant and victim had engaged in anal intercourse prior to the victim's injury only had a "tenuous connection" to the issue of consent but a "great potential for embarrassment, harassment, and unnecessary intrusion into privacy." *McLaughlin, supra* at ___, citing *Lucas* (*On Remand*), *supra* at 302-03. The Court of Appeals also concluded that evidence of consensual sexual relations between the defendant and victim after the victim's injury would have undermined the victim's credibility and bolstered the defendant's defense. However, the Court of Appeals found exclusion of this evidence harmless error because the defendant was able to introduce testimony describing such relations and other activities the victim engaged in despite her back injury.

Furthermore, defendant's delay in introducing the evidence suggested "wilful misconduct designed to create a tactical advantage." *McLaughlin, supra* at ___, citing *Lucas* (*On Remand*), *supra* at 302-03.

CHAPTER 8
Scientific Evidence

8.2 Expert Testimony in Sexual Assault Cases

B. Expert Testimony by Physicians and Medical Personnel

Insert the following text on the top of page 406, after the third sentence in the first paragraph:

The Michigan Court of Appeals addressed, but did not resolve, a defendant's challenge to the admission of a SANE's expert testimony at the defendant's trial. In *People v McLaughlin*, ___ Mich App ___ (2003), the defendant was convicted of CSC. On appeal, he argued that the trial court erred in permitting a SANE to testify as an expert when the prosecution did not designate her as an expert during pretrial discovery. The Court of Appeals did not decide the issue of failing to designate a witness as an expert, but instead upheld the trial court's decision because allowing the SANE to testify as an expert was harmless. The SANE testified about her observations and findings during an examination of the victim. The Court of Appeals found that the only statements in the SANE's testimony that could be construed as "specialized knowledge" were her statements that the victim's physical state and demeanor were consistent with that of a recent rape victim. The Court of Appeals concluded that these statements did not involve "highly specialized knowledge" and were "largely based on common sense." *McLaughlin, supra* at ___. The Court of Appeals also indicated that although it rejected the defendant's argument because any error was harmless, it was also inclined to reject the defendant's argument because MCR 6.201(A) does not explicitly require pretrial designation of expert and lay witnesses. *McLaughlin, supra* at ___.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.5 Imposition of Sentence

B. Sentencing Guidelines

Insert the following text on page 455, after the "**Note**":

The Court of Appeals in *People v McLaughlin,* ___ Mich App ___, ___ (2003), held that trial courts are prohibited from assigning points under OV 11 for the one penetration that forms the basis of a first- or third-degree CSC conviction that constitutes the sentencing offense, but are directed to score points for any additional penetrations that did not form the basis of the sentencing offense. In *McLaughlin*, the defendant was convicted of three counts of first-degree CSC. For each conviction, the trial court scored 50 points under OV 11 for the two criminal sexual penetrations forming the basis of the other two convictions. The defendant objected to the scoring of OV 11 and indicated that MCL 777.41(2)(c) prohibits a scoring of points for the penetration that forms the basis of *an* offense. The Court of Appeals upheld the scoring indicating that scoring 50 points for a defendant's conviction of first-degree CSC was appropriate where the defendant is also convicted of two other first-degree CSC charges arising out of the same assault. *McLaughlin, supra* at ___.

CHAPTER 9

Post-Conviction and Sentencing Matters

9.5 Imposition of Sentence

E. Probation

5. Contents of Probation Orders

Effective October 1, 2003, 2003 PA 101 amends MCL 771.3 to require the court to impose an additional condition on probationers. Near the bottom of page 460, replace the fourth bullet with the following:

- The probationer shall pay certain fees listed in the statute, restitution to the victim or victim's estate and the minimum state cost prescribed by MCL 769.1j.

CHAPTER 11

Sex Offender Identification and Profiling Systems

11.4 DNA Identification Profiling System

E. Ordering and Distribution of Assessment Fees

1. Persons Convicted or Found Responsible

Replace the current text in Section 11.4(E)(1) with the following text beginning on the bottom of page 539:

After October 1, 2003, the court is no longer required to order the DNA assessment fee provided for in MCL 28.176(5). The court is still required to order the DNA testing; however, the corresponding assessment fee has been eliminated.

If the court ordered the DNA assessment fee prior to October 1, 2003, but the fee is collected on or after October 1, 2003, then the court must distribute the DNA assessment or portions of the DNA assessment as follows:

- 10% to the court.
- 25% to the county sheriff or other investigating law enforcement agency that collected the DNA sample as designated by the court.
- 65% to the State Treasurer for deposit in the Justice System Fund. MCL 28.176(8).